

would invade the province of the jury to decide the case; jurors, relying on their own common knowledge and experience, could consider the facts and, coupled with the testimony of the lay witnesses, reach their own conclusions regarding liability. Nothing that Mr. Button would have to say would assist the jury in understanding the facts of this case. See Kline v. Ford Motor Co., 523 F.2d 1067, 1070 (9th Cir. 1975)³ (the district court may properly refuse to admit expert opinion on the ultimate issue based on its assessment of the borderline value of the evidence to the jury). See also Johns Heating Serv. v. Lamb, 46 P.3d 1024 1038 n.60 (Alaska 2002) (citations omitted) (expert testimony is not required in non-technical situations where negligence is evident to lay people); 313 Am. Jur. 3d Expert and Opinion Evidence § 203 (expert opinion testimony should not be permitted to invade the field of common knowledge or the province of the jury).

Accordingly, defendant respectfully requests that its Motion in Limine be granted, and that Mr. Button be excluded from testifying in this case.

³ Kline also noted that "[w]e agree with Professor Wigmore that the appropriate criterion for receiving opinion evidence from a qualified witness is '[c]an a jury from this person receive appreciable help?'" Kline 523 F.2d at 1070 (quoting 7 J. Wigmore, Evidence (3d ed. 1940 § 1923)).

DEFENDANT ARG ENTERPRISES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT II OF PLAINTIFF'S COMPLAINT, NEGLIGENCE PER SE AND MOTION IN LIMINE TO EXCLUDE PLAINTIFF'S EXPERT

MEYER v. ARG ENTERPRISES, INC., CASE NO. 3:05-cv-00239-TMB
PAGE 11 OF 13

VII. Conclusion

Defendant respectfully requests that its Motion for Partial Summary Judgment on Count II of plaintiff's complaint alleging negligence per se be granted.

Defendant also respectfully requests that its Motion in Limine to exclude the testimony of Richard Button be granted.

DATED this 14th day of February, 2007, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 14th day of February, 2007, to:

Robert J. Jurasek
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DEFENDANT ARG ENTERPRISES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT II
OF PLAINTIFF'S COMPLAINT, NEGLIGENCE PER SE AND MOTION IN LIMINE TO EXCLUDE
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LIST OF EXHIBITS

DEFENDANT ARG ENTERPRISES' MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNT II OF PLAINTIFF'S COMPLAINT, NEGLIGENCE PER SE AND
MOTION IN LIMINE TO EXCLUDE PLAINTIFF'S EXPERT

<u>Exhibit No.</u>	<u>Description</u>
A	First Discovery Requests to Plaintiff
B	Excerpts from Deposition of Richard Button, 9/28/06
C	Richard C. button, P.E., Expert Witness Qualifications
D	Photograph
E	Excerpt from the 2003 International Building Code

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA, AT ANCHORAGE

MARLENE G. MEYER,

Plaintiff,

v.

ARG ENTERPRISES, INC., aka STUART
ANDERSON'S CATTLE COMPANY
RESTAURANTS,

Defendant.

Case No. A05-239 CV (JKS)

**FIRST DISCOVERY REQUESTS TO
PLAINTIFF**

COMES NOW plaintiff, MARLENE G. MEYER by and through counsel, and pursuant to Rules 33 and 34 of Alaska R. Civ. P., to request that plaintiff in this matter answer, in writing, within thirty days (plus three if mailed) of the date of service hereof, the following requests for production and interrogatories.

Please be advised that plaintiff is under a continuing obligation for the supplementation of the answers to these discovery requests based on newly acquired information.

INSTRUCTIONS

Interrogatories:

The interrogatories set forth below are served upon you in accordance with Rules 26 and 33 of the Alaska R. Civ. P. Each interrogatory must be answered separately and in the fullest detail possible, under oath, in the spaces provided, using additional sheets as needed.

If any interrogatory is objected to, the reasons for the objection must be stated. If the objection is made to part of an interrogatory, the part objected to must be specified.

Exhibit A

Ophthalmic Association (Dr. Rosen)	\$ 6,743.00
Dr. Scott Keister	\$ 715.00
Providence Anchorage Anesthesia Medical	\$ 1,008.70
Dr. T. Ikahihifo	\$ 393.00
Sears Optical	\$ 513.98
Providence Health System	\$ 4,885.68
Carrs Pharmacy	\$ 48.06
Fred Meyer Pharmacy	\$ 103.35
 TOTAL	
	\$ 23,161.64

INTERROGATORY NO. 11: Please provide a general summary of all activities of plaintiff on the date of the accident from the time plaintiff got out of bed until the time plaintiff went to bed. In providing this summary, please provide the times each activity began and ended to the best of plaintiff's recollection.

ANSWER:

1-7-05-8:00 a.m. Went to office, did office duties.

1:00 p.m. Went to lunch at Stuart Anderson's Cattle Company with two friends.

2:30 p.m. Finished lunch and walked out the door along the sidewalk beside the building and tripped on a lip of the sidewalk and slammed my face into the cement. I was unable to get up, so I crawled to the nearest car and used the bumper of the car to pull myself up. I was stunned and since my nose was bleeding, I went to my vehicle and got some Kleenex and cleaned up myself before going back into the restaurant to report this fall to the General Manager-Kerry Young. We sat down and he wrote out an accident report. I had him come outside with me to show him where I tripped. There was some drops of my blood on the sidewalk. I drove myself to (First Care) to have my wrist/arm looked at. I thought I broke my arm. The doctor put a cast on my arm. I didn't feel so good so I called (Ruth Jessen) to pick me up from First Care Medical Center and take me back to the office (Arctic Inn Motel). I went to my room and rested for the rest of the day and night. EXHIBIT A

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARLENE G. MEYER,

Plaintiff,

-vs-

ARG ENTERPRISES, INC. aka STUART
ANDERSON'S CATTLE COMPANY
RESTAURANTS,

Defendant.

Case No. 3:05-cv-00239-TMB /

 COPY

DEPOSITION OF RICHARD BUTTON

Pages 1 - 44 inclusive

September 28, 2006, 10:00 a.m.

Anchorage, Alaska

Exhibit B

Page 1 of 6 Pages

Page 1

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Page 24

1 **Q. If you recall when you visited?**
 2 A. I don't recall. I know that I picked up
 3 Mrs. Meyer and went over there to make sure that I
 4 understood where the spot was. And that was -- seems to
 5 me there was, at that point there was snow on the ground.

6 **Q. Did you take any photographs?**

7 A. Yes, I did.

8 **Q. Is this your only --**

9 A. Here they are.

10 **Q. Is this your only copy?**

11 A. You can mark it as an exhibit. I'll make a note
 12 to recopy those.

13 (Exhibit 4 was marked.)

14 BY MR. EARNHART:

15 **Q. Looking at the photographs in Exhibit 4, did Ms.**
 16 **Meyer identify exactly where she fell to you?**

17 A. Yeah.

18 **Q. And could you identify in those photographs, it**
 19 **looks like they've got JPG numbers underneath each photo?**

20 A. Yeah, it was, the general picture would be
 21 2555.JPG.

22 **Q. As for a specific location or a specific piece**
 23 **of cement or the sidewalk, did she identify?**

24 A. Well, it's hard to see -- it's hard to see from
 25 here. But it's -- it's back here, right next to the --

Page 23

Page 25

1 it's better shown in this area right here.

2 **Q. You're referring to Exhibit 3?**

3 A. Right.

4 **Q. And --**

5 A. I have some other pictures -- I don't know, why
 6 they're not in the file -- that I can produce. These
 7 were just general background photos that were taken.

8 **Q. Okay.**

9 MR. EARNHART: Bob, can you produce those?
 10 THE WITNESS: I'll get those.

11 BY MR. EARNHART:

12 **Q. Looking at Exhibit 3, the first page DEF 00001,**
 13 **did she identify specifically where she fell?**

14 A. Yeah, it was right in -- right here.

15 **Q. And you're pointing to --**

16 A. Pointing to a piece of sidewalk, a joint that's
 17 just beyond the corner of the building. I think it would
 18 be the northeast corner of the building. And it's where
 19 the sidewalk that runs along the east face of the
 20 building joins the -- and actually comes into the
 21 sidewalk that runs across the front of the building,
 22 which would be the north face.

23 **Q. Okay. In regard to that seam there, did she**
 24 **identify which edge she tripped on or --**

25 A. I -- if I remember correctly, it was this edge

1 here, which she was traveling out of the building
 2 traveling east on her way to her car, which is parked on
 3 that side of the building. And she tripped on the edge
 4 of the sidewalk that was running along the north face of
 5 the building and was -- became part of the other
 6 sidewalk, intruded into it, I guess, by a little bit, by
 7 about two or three feet.

8 **Q. She tripped on the east edge of that?**

9 A. Yeah, she tripped -- well, she tripped on the
 10 west edge of the sidewalk section that was running along
 11 the east side of the building.

12 **Q. In regard to that seam that we're talking about,**
 13 **is it fair to say there's just one piece of cement there**
 14 **that has the tapered edges to it? Do you recall that?**

15 A. There's one piece of concrete that -- one large
 16 section that's probably four-by-six or eight and, yeah,
 17 where that extends into the sidewalk at the front of the
 18 building, it's raised slightly and there's a rounded edge
 19 there, yeah.

20 **Q. Okay. Along that, the east seam there, did she**
 21 **say -- was she more towards the north or more towards the**
 22 **south when she fell or did she describe it at all to you?**

23 A. No, she wasn't -- I don't remember her being
 24 real specific. It was just right in this area here,
 25 probably more -- I had the impression in talking with her

Page 23

Page 25

1 that this was in this area here, more to the north end of
 2 this edge.

3 **Q. Okay. Did she describe her fall in any way, as**
 4 **to what foot tripped or --**

5 A. Not. What I remember, she just went over and
 6 hit her face, is what was told and what I remember.

7 **Q. Okay. Going back one step, have you taken any**
 8 **courses or done any study in human factors or any of that**
 9 **area as to how people react and how bodies react?**

10 A. No.

11 **Q. Have you taken any courses or any classes or**
 12 **seminars specifically in regard to sidewalk design?**

13 A. Well, we're -- I guess specifically, no. I'm
 14 sure they must exist, but generally speaking, civil
 15 engineers are grounded in general principles of concrete
 16 and design and code requirements, and we take off and do
 17 it. I mean, I've written specs for sidewalks over my
 18 years of practice and they're pretty standard, pretty
 19 bump and grind stuff, nothing real special about them.

20 If you want to get into super flat floors for
 21 warehouses, that's a different story, but sidewalks are
 22 pretty straightforward.

23 **Q. When you say straightforward specs, what kind of**
 24 **specs go into a sidewalk?**

25 A. Well, you've got several sections. Obviously,

Exhibit

7 (Pages 22 to 25)

Richard Button

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1 It's just kind of fine tuning that drives you nuts that
 2 happens.

3 In general, things move forward pretty much the
 4 same. They very seldom go back and make anything less
 5 restrictive.

6 **Q. But sitting here today, you can't point to any**
 7 **provisions within the 2003 IBC code that reference the**
 8 **accessibility standard similar to 4.52 of the ADA --**

9 A. Sitting here in this room right now, no. With
 10 a -- given a few minutes with the code, I could probably
 11 produce that, certainly for trial.

12 **Q. When you measured the difference in height at**
 13 **this particular location, how do you do your**
 14 **measurements? Is it from the bottom of the crack between**
 15 **the two pieces of cement or is it from a different point?**

16 A. Yeah, it would be basically from -- if you've
 17 got two pieces of concrete sidewalk, you'll measure from
 18 the base of one to the top of the other. Basically top
 19 to top, and whatever the difference is is what the
 20 measurement would be.

21 **Q. Okay. In regards to the piece of concrete we're**
 22 **dealing with here, it has a general flat surface but then**
 23 **the edges are tapered about two or three inches out.**
 24 **What counts as the top of that block of concrete for**
 25 **measurement purposes?**

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1 A. I don't understand quite what you're saying, but
 2 let's look at the picture.

3 **Q. For example, the last picture in Exhibit 3, you**
 4 **can see the tapered edge where they used a cement tool.**

5 A. They flattened that out with a trawl.

6 **Q. They use a trawl and it tapers down the edge**
 7 **about a quarter to a half an inch; is that consistent**
 8 **with your memory?**

9 A. My memory is that that -- yeah, there's a gap or
 10 drop there. I doubt -- it's probably not more than a
 11 quarter inch, probably more than like an eighth.

12 Typically that's what they do.

13 For all intents and purposes, there's not much
 14 difference between this, what you're calling a raised
 15 section and the perimeter edge here. It's --

16 **Q. Let's assume that there was a significant**
 17 **difference, what counts as the top of that cement -- that**
 18 **piece of cement for measurement purposes?**

19 A. It would be the edge at the -- adjacent to the
 20 slab.

21 **Q. What if the gap between the two slabs was, let's**
 22 **say, four inches, does that present different issues as**
 23 **far as measuring the height between the slabs?**

24 A. I'm not really prepared to discuss that. That
 25 becomes a gap. And that affects the way people perceive

1 things. And -- yeah, that's -- to me, I don't have an
 2 opinion on how that would affect my opinion.

3 **Q. Are there code provisions that apply to gaps?**

4 A. You're not supposed to have gaps in an exit or a
 5 sidewalk. I mean, I guess that would be the provision
 6 that would apply, you're supposed to have a continuous
 7 flat surface.

8 **Q. But sidewalks are not continuous flat surfaces,**
 9 **are they?**

10 A. They're supposed to be.

11 **Q. But they're not poured as one piece of concrete?**

12 A. That is correct. But as long as they butt
 13 together, they're considered continuous.

14 **Q. When we say butt together, how close to do they**
 15 **have to be together?**

16 A. Ideally -- that depends on the type of joint.

17 You've got expansion joints and control joints. In this
 18 sidewalk here these appear, just looking at them, to all
 19 be control joints. So they would have troweled down each
 20 side and created a weakened plane by breaking this joint
 21 down a third of the depth of the concrete, so that the
 22 crack would occur in the joint, as opposed to into the
 23 surface. I'm not sure quite what happened here.

24 I don't remember, and it's not obvious from this
 25 photograph, this appears to be what would be called an

1 expansion joint. In that case they put a half-inch,
 2 anywhere from a quarter- to a half-inch piece of mastic.
 3 It's usually fiberboard impregnated with asphalt to allow
 4 the -- for thermal expansion between the different
 5 lengths of concrete so that you don't end up with a
 6 buckle when it gets hot.

7 So sidewalks generally don't have a gap of more
 8 than a half an inch, or they shouldn't if they're
 9 constructed properly.

10 **Q. Is there any specific code provisions that**
 11 **address that gap?**

12 A. No. I -- I -- other than the portions of the
 13 code that say you're supposed to have a continuous
 14 surface, and those provisions accept the reality of
 15 construction, which is that you've got to have expansion
 16 joints.

17 **Q. In regard to concrete, often the edges are**
 18 **troweled one way or another. Are there any provisions**
 19 **regarding how the edges of the concrete can be troweled,**
 20 **what sort of curve or how much difference --**

21 A. No. Again, standard in the industry, I'm sure
 22 if somebody was to go way out on a limb and put a
 23 two-inch radius on the edges of their sidewalk, you know,
 24 in the area of travel, that they probably would get
 25 called by the Municipality.

9 (Pages 30 to 33)

Richard Button

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1 So you can go into any hardware store, Alaska
 2 Industrial Hardware, and buy trowels. They've got
 3 standard edges. What that radius is, I don't know. It's
 4 pretty much accepted by the industry and that's what you
 5 get. Probably quarter-inch radius, or something like
 6 that.

7 **Q. In this particular case the troweled piece of**
 8 **concrete, it's troweled differently than the adjoining**
 9 **pieces of concrete, correct?**

10 A. It appears that there was some attempt to fill
 11 in what was a flower bed or a planting area. And that
 12 that -- and I say that simply because the finish on that
 13 particular concrete was different than what you see
 14 everywhere else.

15 **Q. It appears to have been laid at a later date?**

16 A. Could be a later date. Certainly a different --
 17 at a different time.

18 **Q. It's right on that corner where people may have**
 19 **traveled over the flower bed, or something?**

20 A. It -- as I remember it, that extends all the way
 21 back -- that extends all the way back to the door. It
 22 looks to me like at one time they thought they wanted to
 23 have a planting bed in there. And the reality of it is
 24 it's on the north side of the building. And it's
 25 undercover. And things didn't grow well there. And they

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1 just ended up with an eyesore, so they filled it in. But
 2 I have no basis for that, other than just -- just knowing
 3 something about what grows up here, since that's one of
 4 my hobbies. And I suspect that's what happened.

5 **Q. I think it says in your report that it appears**
 6 **the pieces of cement had moved due to frost heaving**
 7 **and/or settling; is that your opinion?**

8 A. I'll have to go look and see what I said.

9 Yeah, I say it was not clear whether the
 10 difference was due to frost heave or settling of sections
 11 of the sidewalk.

12 **Q. Do you have any opinion at all as to why the**
 13 **difference in elevation exists?**

14 A. My guess is that it settled. And I say that
 15 because; looking at these pictures and looking at -- my
 16 pictures were taken in the winter. These pictures, I
 17 don't see any snow on the ground. And I've been there
 18 recently. And this is -- this piece of concrete's pretty
 19 much -- stayed as it shows there. So my guess is that
 20 there isn't any frost heave going on. And if there
 21 isn't, it probably was settlement.

22 **Q. Either frost heaving or settlement, are those**
 23 **uncommon in sidewalk situations here in Anchorage?**

24 A. Uncommon, no.

25 **Q. Had you ever been to this location prior to**

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1 **being retained in this case?**

2 A. Sure. My offices are right across the street.
 3 So -- although that -- and over the years the Cattle
 4 Company's been kind of a hangout, so it's gone through a
 5 lot of incarnations and I was part of some of those,
 6 so --

7 **Q. When you say you were part of some of those, did**
 8 **you ever participate at all in any of the design?**

9 A. Not any of the design. I participated in the
 10 partying that went on inside.

11 **Q. Had you ever noticed that piece of concrete**
 12 **before?**

13 A. No.

14 **Q. Any particular reason you would notice or not**
 15 **notice it?**

16 A. No.

17 **Q. Had you ever stumbled there before?**

18 A. No.

19 **Q. Do you think you had crossed that location**
 20 **before?**

21 A. Probably not. I usually don't park on this side
 22 of the building.

23 **Q. You said several times that sidewalks are**
 24 **supposed to be continuous surfaces. What provision of**
 25 **the code applies to that?**

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1 A. Well, the -- the sections that talk about
 2 exiting talk about landings being level surfaces or
 3 sloped surfaces, but not discontinuous surfaces.

4 **Q. Is this considered a landing, the location of**
 5 **this accident?**

6 A. The code often speaks to general areas that --
 7 that are then carried on forward. So -- so,
 8 in other words, it's understood that you're not going to
 9 have ups and downs in any means of egress. And this
 10 sidewalk would still be considered a means of egress from
 11 the building.

12 **Q. When does a landing or a means of egress become**
 13 **a sidewalk or something different?**

14 A. When you exit a building and the exit opens onto
 15 a sidewalk, then that becomes a means of egress.

16 And there are standards; specifications for
 17 sidewalks require that they be level, that there be no
 18 change in elevation between the different pieces of it
 19 after it's done. And slabs are the same way, they're
 20 required to be, you know, not more than quarter-inch out
 21 of level in ten feet so -- they're just -- obviously, if
 22 we have a sloping site, then sidewalks are going to slope
 23 with the site. But within that slope, they're supposed
 24 to maintain continuity of elevation, so that you don't
 25 trip. That's the whole point, is trying to not trip.

Exhibit 10 (Pages 34 to 37)

Alaska Stenotype Reporters 907-276-1680

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